# Felony Arraignments in District Court

# 4

## Part A—Commentary on Felony Arraignments



## Part B—Commentary on Felony Pleas in District Court

## Part C—Checklists

# Part A—Commentary on Felony Arraignments

## 4.1 Applicable Court Rules

MCR 6.610(H)* expressly applies to a defendant's first appearance in district court for an offense not cognizable in district court—i.e., felony offenses and misdemeanor offenses punishable by imprisonment for more than one year. The "arraignment" to which MCR 6.610(H) refers is the proceeding at which a defendant makes his or her first appearance in *any* court. MCR 6.610(H) does not refer to the "arraignment" that occurs after a defendant has been bound over for trial following his or her preliminary examination.

*As amended, effective January 1, 2006. Formerly MCR 6.610(G).

Although the district court does not have trial jurisdiction over felony offenses, the district court has jurisdiction over *all* preliminary examinations, except that no preliminary examination is held for misdemeanor offenses over which the district court has trial jurisdiction. MCL 600.8311(d). If, after the preliminary examination, the district court finds probable cause to bind an individual over for trial on a felony or misdemeanor not cognizable by the district court, the individual may be arraigned on the offense in the court having trial jurisdiction over the offense—the circuit court. MCR 6.113(A).

> **Note:** MCR 6.111 is a new court rule that creates an exception to the general rule that post-bindover arraignments must occur in the court with trial jurisdiction over the offense charged. Under certain conditions, MCR 6.111 authorizes a district court judge to conduct the arraignment following a defendant's bindover and to take pleas to offenses not cognizable in district court. MCR 6.111 is discussed in Part B—Commentary on Felony Pleas in District Court.

Part A of this monograph discusses district court arraignments involving felony offenses as those arraignments are contemplated under MCR 6.610(H); that is, Part A discusses an accused's first appearance in court on a charged offense over which the district court does not have trial jurisdiction.

## 4.2 Jurisdiction and Venue

### A. Jurisdiction

A district court has the same power to hear and determine matters within its jurisdiction as does a circuit court over matters within the circuit court's jurisdiction. MCL 600.8317. A district court has jurisdiction over felony and misdemeanor arraignments, as well as the authority to conduct preliminary examinations in all criminal cases over which the circuit court has trial jurisdiction. MCL 600.8311(c)–(d). A circuit court's trial jurisdiction

includes "serious" or "high court" misdemeanors for which two years of imprisonment may be imposed.

The Michigan Code of Criminal Procedure, MCL 760.1 *et seq*., defines "felony" as a violation of Michigan's penal law for which a person, if convicted of the offense, may be punished by death or by imprisonment for more than one year or an offense specified by law to be a felony. MCL 761.1(g). See also MCL 750.7 (Penal Code's definition of felony). The Michigan Penal Code defines "misdemeanor" as an act or omission that is not a felony, that is punishable by law or discretion of the court with a fine, penalty or forfeiture, or less than one year of imprisonment. MCL 750.8. Consequently, any "misdemeanor" punishable by more than one year of imprisonment is a "felony" for purposes of determining trial jurisdiction.

**Criminal conduct near county boundary lines.** When an offense is committed within one mile of the boundary line between two counties, jurisdiction is proper in either county. MCL 762.3(1) provides:

> "Any offense committed on the boundary line of 2 counties, or within 1 mile of the dividing line between them, may be alleged in the indictment to have been committed, and may be prosecuted and punished in either county."

## B. Venue

For a **first class district**, venue for criminal actions is in the **county** where the violation occurred. MCL 600.8312(1). A first class district is made up of one or more counties, and each county is responsible for maintaining, financing, and operating the district court within that county. MCL 600.8103(1).

For a **second class district,** venue for criminal actions is in the **district** where the violation occurred. MCL 600.8312(2). A second class district is made up of a group of political subdivisions within a county, and the county is responsible for maintaining, financing, and operating the district court within the county. MCL 600.8103(2).

For a **third class district**, venue for criminal actions is in the **political subdivision** where the violation occurred, except that when the violation occurred in a political subdivision where the court is not required to sit, venue is proper in any political subdivision where the court is required to sit. MCL 600.8312(3). A third class district is made up of one or more political subdivisions within a county, and each political subdivision is responsible for maintaining, financing, and operating the district court within that political subdivision. MCL 600.8103(3).

**Criminal conduct near county boundary lines.** "If an offense is committed on the boundary of 2 or more counties, districts or political subdivisions or within 1 mile thereof, venue is proper in any of the counties, districts or political subdivisions concerned." MCL 762.3(3)(a).

**Multiple counties affected by an offense.** MCL 762.8 permits prosecution of a felony in any county where any one criminal act occurred when the felony offense is made up of more than one criminal act. However, even though the effects of a crime may extend to more than one county, venue is not proper in a county where none of the criminal acts necessary to the commission of the crime occurred. *People v Webbs*, 263 Mich App 531, 534–535 (2004).

## 4.3 A District Court Magistrate's Authority

Subject to the chief district judge's approval, district court magistrates generally have the authority to issue arrest warrants, conduct arraignments, fix bail and accept bond, accept pleas for specified offenses, and impose sentences for specified offenses. MCL 600.8511(a)–(e).

> **Note:** The terms "magistrate" and "district court magistrate" are not always synonymous. According to the Code of Criminal Procedure, a "magistrate" is a district court judge or a municipal court judge, but a "magistrate" is not a "district court magistrate." MCL 761.1(f). The term "district court magistrate" is specifically used in the Code of Criminal Procedure when the subject matter involves a district court magistrate. But the Code of Criminal Procedure also states that a "district court magistrate" may exercise the powers, jurisdiction, and duties of a "magistrate" if expressly authorized by the Revised Judicature Act, MCL 600.101 *et seq*. That is, if authorized by law, a "district court magistrate" may exercise the powers and duties of a municipal court or a district court judge. MCL 761.1(f).
>
> Note also that MCR 6.003(4) recognizes the distinction between a "magistrate" and a "district court magistrate." MCR 6.003(4) defines "court" or "judicial officer" as "a judge, a magistrate, or a district court magistrate authorized in accordance with the law to perform the functions of a magistrate." A district court magistrate's authority is also subject to conditions found in MCR 4.401(A)–(B), which provide:
>
> > **"(A) Procedure.** Proceedings involving magistrates must be in accordance with relevant statutes and rules.
> >
> > **"(B) Duties.** Notwithstanding statutory provisions to the contrary, magistrates exercise only those duties expressly authorized by the chief judge of the district or division."

**Arrest warrants.** A district court magistrate may issue arrest warrants for felonies, misdemeanors, and ordinance violations pursuant only to the written authorization of the prosecuting attorney or municipal attorney. MCL 764.1(1)–(2) and MCL 600.8511(d).*

*See Smith, Criminal Procedure Monograph 1: *Issuance of Complaints & Arrest Warrants–Third Edition* (MJI, 2006), for a more complete discussion of issuing arrest warrants.

**Arraignments and pleas.** MCL 600.8513(1) states that

> "[w]hen authorized by the chief judge of the district and whenever a district judge is not immediately available, a district court magistrate may conduct the first appearance of a defendant before the court in all criminal and ordinance violation cases, . . . but this section shall not authorize any district court magistrate to accept a plea of guilty or nolo contendere not expressly authorized pursuant to section 8511 or 8512a."

A district court magistrate's authority to accept guilty or nolo contendere (no contest) pleas is limited to the specific violations listed in MCL 600.8511(a)–(c).* The district court magistrate's authority to accept pleas and impose sentences is subject to the chief judge's approval and involves violations punishable by not more than 93 days. *Id*.

*See Hummel, Criminal Procedure Monograph 3: *Misdemeanor Arraignments & Pleas—Third Edition* (MJI, 2006), Section 3.3, for more information.

**Fixing bail and accepting bond.** Without any apparent qualification, a district court magistrate has a duty "[t]o fix bail and accept bond in all cases." MCL 600.8511(e). See SCAO Form MC 241 (Bond).

**Appointing counsel.** If authorized by the chief judge of the district, a district court magistrate may appoint counsel to an indigent defendant charged with a misdemeanor offense or ordinance violation punishable by not more than one year of imprisonment. MCL 600.8513(2)(a).

**Appealing a district court magistrate's ruling.** A party may appeal as of right any decision of the district court magistrate to the district court in which the magistrate serves. The appeal must be in writing, must be made within seven days of the entry of the decision being appealed, and should substantially comply with the form outlined in MCR 7.101(C). Except as otherwise provided by statute or court rule, no fee is required to file an appeal of a district court magistrate's ruling. The district court hears the matter *de novo*. MCR 4.401(D).

**District court judge's control of magisterial action.** MCR 4.401(C) states that "[a]n action taken by a magistrate may be superseded, without formal appeal, by order of a district judge in the district in which the magistrate serves."

> **Note:** MCR 4.401(C) does not expressly distinguish between "magistrate" and "district court magistrate."

## 4.4 Record Requirements

Except as provided by law or supreme court rule, all proceedings in district court shall be recorded by the district court recorder by the use of approved recording devices or taken by the district court reporter. MCL 600.8611; MCL 600.8331. MCR 6.104(F) expressly mandates that "[a] verbatim record must be made of [a felony] arraignment."

## 4.5 Right to an Arraignment

Michigan law mandates that an arrestee be arraigned before a magistrate "without unnecessary delay." MCL 764.13; MCL 764.26; *People v Cipriano*, 431 Mich 315, 319 (1988).

Express statutory authority for felony arraignments is contained in MCL 764.26:

> "Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer."

General statutory authority for arraignments following a *warrantless* arrest for an offense of unspecified severity is contained in MCL 764.13:

> "A peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is charged to have been committed, and shall present to the magistrate a complaint stating the charge against the person arrested."

A defendant's knowledge of the nature and cause of the accusations made against him or her is a fundamental due process right. *People v Thomason*, 173 Mich App 812, 814–815 (1988). A conviction obtained for an offense on which the defendant was not arraigned and where the record does not show that the defendant waived his or her right to an arraignment must be reversed. *Id*. at 815.

# 4.6 Time Requirements for Arraignments

## A. "Without Unnecessary Delay"

*As amended, effective January 1, 2006.

Felony arraignments must be held "without unnecessary delay." MCR 6.104(A); MCL 764.1b; MCL 764.13; MCL 764.26. MCR 6.104(A)* states:

> **"(A) Arraignment Without Unnecessary Delay.** Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of this rule, or must be arraigned without unnecessary delay by use of two-way interactive video technology in accordance with MCR 6.006(A)."

The purpose of a prompt arraignment is

> "to advise the arrestee of his constitutional rights and the nature of the charges against him by an impartial judicial magistrate, to insure that the arrestee's rights are not violated, and to afford the arrestee an opportunity to make a statement or explain his conduct in open court if he so desires. [P]rompt arraignment is of particular importance when . . . a person is arrested without a warrant. In such situations, arraignment provides a *judicial* determination of probable cause which would not otherwise occur until the preliminary examination. [P]rompt arraignment affords the arrestee an opportunity to have his right to liberty on bail determined." *People v Mallory*, 421 Mich 229, 239 (1984) (footnotes omitted; emphasis in original).

In each county, the court with trial jurisdiction over felony cases must submit a plan for making a judicial officer available to conduct felony arraignments on each day of the year, or the plan must make a judicial officer available every day of the year to set bail for felony offenses. MCR 6.104(G)(1)–(2).

Where a court adopts the latter plan of availability and makes an officer available to set bail each day of the year, the court's plan must provide for the prompt transport of any defendant who is unable to post bond to the judicial district where the offense occurred. MCR 6.104(G)(2). "Prompt transportation" requires that the defendant be arraigned "not later than the next regular business day." *Id*.

## B. Consequences of a Lengthy Delay

Failure to comply with the time requirements prescribed for a criminal defendant's arraignment may jeopardize the nature or amount of evidence admissible in subsequent court proceedings against the defendant. Pre-arraignment delay is only one factor to be considered when determining whether a defendant's confession was voluntary or whether physical evidence

was obtained lawfully. *People v Cipriano*, 431 Mich 315, 319 (1988). Evidence must be excluded when it was obtained during an unlawful detention designed to allow law enforcement personnel additional time to gather evidence. *People v Mallory*, 421 Mich 229, 240 (1984). The exclusionary rule similarly bars the admission of any evidence that would not have been obtained but for the procurement of evidence first obtained by unlawful detention. *Id*. at 241.

The requirement that an accused be arraigned "without unnecessary delay" is more clearly quantified by case law involving defendants' challenges to the length of their post-arrest/pre-arraignment detention. In all "but the most extraordinary situations," an individual arrested without a warrant may not be detained for more than 48 hours without a judicial determination of probable cause. *People v Whitehead*, 238 Mich App 1, 4 (1999). Where there is no bona fide emergency to justify a lengthy detention and circumstances indicate that the detention was prolonged in an effort to obtain more evidence to support the accused's guilt, a person's constitutional right to be free of unreasonable seizure is implicated. *Id.* at 13. The test to determine whether a confession is voluntary is not limited to whether the delay was reasonable; a court must determine whether the delay was used for the purpose of coercing a confession from the arrestee. *People v Bohm*, 49 Mich App 244, 252 (1973).

A delay of more than 48 hours between a defendant's warrantless arrest and the probable cause hearing is presumptively unreasonable and shifts the burden to the government to show the delay was caused by extraordinary circumstances. *Riverside Co v McLaughlin*, 500 US 44, 56–57 (1991). Based on *Riverside*, the Court of Appeals found that a delay in excess of 80 hours was a presumptive violation of the defendant's Fourth Amendment protection against unreasonable seizure. *People v Manning*, 243 Mich App 615, 631 (2000). However, in the absence of police misconduct, such a lengthy delay did not automatically make involuntary any statements the defendant made during the extended detention. *Id.* at 644–645. Notwithstanding the unreasonableness of the seizure, the *Manning* Court concluded that the ultimate admissibility of a defendant's statement required a traditional inquiry into the statement's voluntariness. *Id.* at 645.* The *Manning* Court emphasized that even short delays could be unconstitutional if the delay was unreasonable under the circumstances presented. *Id.* at 630, citing *Riverside*, *supra*, 500 US at 56–57.

*See Criminal Procedure Monograph 6: *Pretrial Motions—Third Edition* (MJI, 2006), Sections 6.16–6.17.

## 4.7 Location of Arraignment

### A. Arraignment on Arrests Made by Warrant

When a peace officer makes an arrest by warrant, the warrant

> "shall command the peace officer immediately to arrest the person accused and to take that person, without unnecessary delay, before

> a magistrate of the judicial district in which the offense is charged to have been committed . . . ." MCL 764.1b.

*As amended, effective January, 1, 2006.

A defendant arrested by warrant must be arraigned before a court specified in the warrant. MCR 6.104(B). If the defendant was arrested by warrant outside the county in which the offense occurred, then "the arresting agency must make arrangements with the authorities in the demanding county to have the accused promptly transported to the latter county for arraignment in accordance with the provisions of this rule." *Id*. If "prompt transportation" cannot be had, the arrestee must be taken "without unnecessary delay" before the nearest available court for a preliminary appearance pursuant to MCR 6.104(C). MCR 6.104(B). MCR 6.104(B) requires the same "prompt transport" to the proper judicial district when an individual is arrested without a warrant and the arrest occurs in a county outside of the one in which the offense allegedly occurred. MCR 6.104(B)'s requirement that an accused be arraigned without unnecessary delay "may be satisfied by use of two-way interactive video technology in accordance with MCR 6.006(A)." MCR 6.104(B).*

> **Note:** Because most warrantless arrests result from the accused's conduct as witnessed by a law enforcement officer or citizen, warrantless arrests most often are made in the same county where the offense occurred. Exceptions to this may arise when an individual cannot be apprehended immediately but is later located and arrested in a county different from the county in which the individual's conduct was observed.

If an individual is arrested on a warrant for a bailable offense in a county different than the county in which the offense occurred, and the arrestee asks to be taken before a magistrate of the judicial district in which he or she was arrested, the individual must be taken before a magistrate of that district. MCL 764.4. In those circumstances:

- The magistrate before whom the accused appears may take from the person a recognizance with sufficient sureties for the accused's appearance within 10 days before a magistrate in the same district where the charged offense occurred. MCL 764.5.
- The magistrate must certify on the recognizance that the accused was permitted to post bail and deliver the recognizance to the arresting officer. Without unnecessary delay, the arresting officer must see that the recognizance is delivered to a magistrate or clerk of the court where the accused will be appearing. MCL 764.6.
- If the magistrate refuses to permit the arrestee to post bail or if insufficient bail is offered, the official having charge of the arrestee must take him or her before a magistrate in the judicial district where the charged offense was committed. MCL 764.7.

## B. Arraignment on Arrests Made Without a Warrant

An accused arrested without a warrant must be arraigned without unnecessary delay before a court in the judicial district where the offense allegedly occurred, or by use of two-way interactive video technology as described in MCR 6.006(A). MCR 6.104(B).* Statutory law requires a peace officer who arrests an individual without a warrant to, without unnecessary delay, take the arrestee before a magistrate in the district where the offense occurred and present the magistrate with a complaint stating the offense for which the individual was arrested. MCL 764.13. The complaint must comply with the requirements of MCR 6.101 (discussed below) and must be filed at or before the accused's arraignment. MCR 6.104(D). See Smith, Criminal Procedure Monograph 1: *Issuance of Complaints & Arrest Warrants—Third Edition* (MJI, 2006), for more information about the complaint process.

*As amended, effective January 1, 2006.

A complaint's primary function is to cause the magistrate to determine whether to issue a warrant for the accused's arrest. *People v Higuera*, 244 Mich App 429, 443 (2001). A complaint must contain "the substance of the accusation" against the person named in the complaint and may include factual allegations supporting reasonable cause. MCL 764.1d. A warrant issued pursuant to MCL 764.1a must contain "the substance of the accusation" as it is recited in the complaint. MCL 764.1b.

MCR 6.101 contains the requirements of a criminal complaint:

> "A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense." MCR 6.101(A).

When an individual has been arrested without a warrant, the law requires also that a prompt determination of probable cause be made. *People v Mallory*, 421 Mich 229, 239 n 4 (1984). Where an individual is in custody after a warrantless arrest, a magistrate must determine if there exists reasonable cause to believe the individual in custody committed the offense. MCL 764.1c(1). If the court finds reasonable cause, it must either:

- issue a warrant for the accused's arrest according to MCL 764.1b, or
- endorse the complaint according to MCL 764.1c.

If the court endorses the complaint on a finding of reasonable cause, the complaint constitutes a warrant as well as a complaint. MCL 764.1c(2). A magistrate "endorses" the complaint by noting the finding of reasonable cause that a crime was committed and that the individual named in the complaint committed it, and directing that the individual accused of the crime be taken

before the court in the district in which the crime allegedly occurred. MCL 764.1c(1)(b).

## 4.8 Procedure Required for Felony Arraignments in District Court

### A. Advising the Defendant

*As amended, effective January 1, 2006. Formerly MCR 6.610(G).

MCR 6.610(H)* specifies the procedure to be employed by a district court when a defendant first appears in district court for arraignment on an offense over which the circuit court has trial jurisdiction. MCR 6.104(E) also expressly applies to matters of procedure involving offenses over which the circuit court has trial jurisdiction.

When a defendant is arraigned on a felony charge or a misdemeanor charge punishable by more than one year of imprisonment, the court must:

*As amended, effective January 1, 2006. Previously, a court was required to "read the complaint or warrant into the record."

- inform the defendant of the nature of the charge, MCR 6.610(H)(1);*
- "inform the accused of the nature of the offense charged, and its maximum possible prison sentence and any mandatory minimum sentence required by law," MCR 6.104(E)(1);
- if the defendant is not represented by counsel at his or her arraignment, inform the defendant of the right to be represented by an attorney, MCR 6.610(H)(2)(b);
- if the accused is not represented by a lawyer at the arraignment, advise the accused that he or she has a right to remain silent, that anything said orally or in writing can be used against him or her in court, that the accused is entitled to have an attorney present during any questioning consented to, and that the court will appoint an attorney to represent the accused if he or she cannot afford to hire one, MCR 6.104(E)(2)(a)–(d);
- if the defendant is indigent, inform him or her of the right to have an attorney appointed at public expense, MCR 6.610(H)(2)(c);
- advise the accused of his or her right to be represented by an attorney at all subsequent proceedings, and if appropriate, the court must appoint a lawyer, MCR 6.104(E)(3);
- inform the defendant of the right to a preliminary examination, MCR 6.610(H)(2)(a);
- schedule the accused's preliminary examination for a date within 14 days of the arraignment and inform the accused of the date, MCR 6.104(E)(4);

- if an unrepresented defendant waives the preliminary examination at arraignment, before accepting the waiver the court must determine that the waiver is given freely, understandingly, and voluntarily. MCR 6.610(H).
- inform the defendant of the right to consideration of pretrial release, MCR 6.610(H)(2)(d);* and
- determine whether pretrial release is appropriate and if so, what form of pretrial release is proper, MCR 6.104(E)(5).

*As amended, effective January 1, 2006.

The court must also "ensure that the accused has been fingerprinted* as required by law." MCR 6.104(E)(6).

*See subsection (C), below.

The court conducting an accused's arraignment on a circuit court offense is prohibited from "question[ing] the accused about the alleged offense or request[ing] that the accused enter a plea." MCR 6.104(E).

## B. Pretrial Release

When a defendant is arraigned before a court in the same county where the offense allegedly occurred, or before the court specified in the complaint or warrant if the defendant was arrested by warrant, the district court must determine whether pretrial release is appropriate and if so, the court must tailor any conditions of the defendant's pretrial release to the circumstances of the offense and the offender.* MCR 6.104(C) and (E)(5).

*See Sections 4.14–4.16, below, for detailed discussion of pretrial releases.

In general, where the defendant is preliminarily arraigned, "either in person or by way of two-way interactive video technology," before a court in a county other than the county in which the offense occurred, the court must obtain a recognizance from the accused indicating that he or she will appear within the next 14 days before a court specified in the warrant or, in the case of a warrantless arrest, before a court in the judicial district where the offense occurred, or before another designated court. MCR 6.104(C).* After receiving the accused's recognizance, the court must certify the recognizance and deliver it to the appropriate court "without delay." *Id*. If the accused was not released, he or she must be promptly transported to the judicial district of the offense. *Id*. "In all cases, the arraignment is then to continue under [MCR 6.104](D), if applicable, and [MCR 6.104](E) either in the judicial district of the alleged offense or in such court as otherwise is designated." MCR 6.104(C).

*As amended, effective January 1, 2006.

## C. Fingerprinting

At a defendant's arraignment for a felony or misdemeanor punishable by more than 92 days' imprisonment, both a court rule and a statute require the district court to make sure that the accused's fingerprints have been taken as required by law. MCR 6.104(E)(6) and MCL 764.29.

MCL 764.29 describes the process by which the court should "ensure that the accused has been fingerprinted":

> "(1) At the time of arraignment of a person on a complaint for a felony or a misdemeanor punishable by imprisonment for more than 92 days, the magistrate shall examine the court file to determine if the person has had fingerprints taken as required by [MCL 28.243].
>
> "(2) If the person has not had his or her fingerprints taken prior to the time of arraignment for the felony or the misdemeanor punishable by imprisonment for more than 92 days, upon completion of the arraignment, the magistrate shall do either of the following:
>
> > "(a) Order the person to submit himself or herself to the police agency that arrested or obtained the warrant for the arrest of the person so that the person's fingerprints can be taken.
> >
> > "(b) Order the person committed to the custody of the sheriff for the taking of the person's fingerprints."

## 4.9 Required Advice of Rights at Felony Arraignments

### A. Right to Counsel

**In general.** When an unrepresented defendant is arraigned in district court for an offense over which the district court does not have trial jurisdiction, the court must inform the defendant of his or her right to the assistance of counsel and to appointed counsel if he or she is indigent. MCR 6.610(H)(2)(b)–(c).

**At arraignment on the warrant or complaint.** Two different court rules address the court's responsibility, at a defendant's arraignment on the warrant or complaint, to advise a defendant of his or her right to counsel. MCR 6.005(A) and MCR 6.104(E).

*See Sections 4.10 and 4.12(B) for more information.

MCR 6.005(A)(1) requires the court, at a defendant's arraignment on the warrant or complaint, to advise the defendant of his or her right to the assistance of counsel at all subsequent court proceedings. In addition, at a defendant's arraignment on the warrant or complaint, the court must inform the defendant of the right to appointed counsel at public expense if he or she wants an attorney and cannot afford to retain one. MCR 6.005(A)(2). Whether a defendant wishes an attorney's assistance and whether he or she is financially unable to retain an attorney are matters the court must determine by questioning the defendant.* MCR 6.005(A).

**When the defendant is not represented by counsel at arraignment.** MCR 6.104(E)(2) requires a court to convey specific information to a defendant at arraignment "*if the accused is not represented by a lawyer at the arraignment*." (Emphasis added.) Where a defendant is not represented by counsel at arraignment, the court must advise the defendant that he or she is entitled to have an attorney present during any questioning to which the defendant has consented and that the court will appoint an attorney to represent the defendant if he or she is indigent.* MCR 6.104(E)(2)(c)–(d).

*See Section 4.10 for information on appointed counsel.

MCR 6.104(E)(3) further requires the court to advise a defendant at arraignment (whether or not represented by an attorney at the time) that he or she has the right to be represented by an attorney at all subsequent proceedings, and if appropriate, the court must appoint counsel for the defendant.

## B. Advice of Rights at Preliminary Appearance Outside the County of Offense

Whenever an accused is arrested outside the county in which the alleged offense occurred *and* prompt transportation to that county cannot be arranged, the accused must be taken to the nearest available court for a preliminary appearance. MCR 6.104(B). The requirements of MCR 6.104(B) "may be satisfied by use of two-way interactive video technology in accordance with MCR 6.006(A)." MCR 6.104(B).*

*As amended, effective January 1, 2006.

If, at the preliminary appearance, the accused is not represented by counsel, the court must advise the defendant of his or her *Miranda** rights in accordance with MCR 6.104(E)(2) and to determine whether pretrial release is appropriate. MCR 6.104(C). Specifically, when an accused appears before a court outside the county in which the alleged offense occurred, the court is responsible for advising the accused that

*_Miranda v Arizona_, 384 US 436, 444 (1966).

> "(a) the accused has a right to remain silent,
>
> "(b) anything the accused says orally or in writing can be used against the accused in court,
>
> "(c) the accused has a right to have a lawyer present during any questioning consented to, and
>
> "(d) if the accused does not have the money to hire a lawyer, the court will appoint a lawyer for the accused[.]" MCR 6.104(E)(2).

# 4.10 Appointed Counsel

Each trial court (circuit, district, probate, and municipal) must adopt an administrative order describing the court's procedures for selecting, appointing, and compensating attorneys who represent indigent parties before

that court. MCR 8.123(A)–(B). Each trial court's order must be submitted to the State Court Administrator pursuant to MCR 8.112(B)(3). The court's plan "shall [be] approve[d] if its provisions will protect the integrity of the judiciary." MCR 8.123(C).

Although a district court magistrate may appoint counsel for a defendant charged with a misdemeanor, the magistrate is not authorized to appoint counsel in felony cases. MCL 600.8513(2)(a).

When a defendant requests the assistance of an attorney and claims he or she is financially unable to retain one, a determination of the defendant's indigence must be made. MCR 6.005(B). See SCAO Form MC 222 (Petition/ Order for Court Appointed Attorney). The court making this determination should consider the following factors:

- the defendant's present employment status, earning capacity, and living expenses;
- the defendant's outstanding debts and liabilities, secured and unsecured;
- whether the defendant qualifies for and receives public assistance;
- whether the defendant has available real or personal property that could be converted to cash without causing undue financial hardship to the defendant or the defendant's dependents; and
- any other circumstances that impair the defendant's ability to pay the fee ordinarily required to retain competent counsel.

MCR 6.005(B)(1)–(5).

A defendant's indigence must be determined based only on the *defendant's* financial resources, not the financial resources of the defendant's friends and family. *People v Arquette*, 202 Mich App 227, 230 (1993). In *Arquette*, the trial court erred in denying the defendant's counsel a transcript at public expense because the defendant's parents had retained the attorney. The Court of Appeals held that the defendant was indigent and remained so despite the parents' retention of the defendant's counsel. *Id*.

Similarly, a defendant's ability to post bond to gain pretrial release does not make the defendant ineligible for appointed counsel. MCR 6.005(B).

**If the defendant is determined to be indigent.** If the court finds the defendant indigent, an attorney must be promptly appointed and notified of his or her appointment. MCR 6.005(D). A defendant may be only partially indigent. If a defendant is determined to be only partially indigent, the court may require the defendant to contribute to the costs of his or her defense. The court may establish a repayment plan and order the defendant's compliance with the plan. MCR 6.005(C). See SCAO Form DC 213 (Advice of Rights),

which specifically states: "You may have to repay the expense of a court appointed attorney."

Where a defendant did not claim an inability to pay an attorney, the defendant was presumed able to reimburse the county for the costs of his appointed counsel. *People v Nowicki*, 213 Mich App 383, 386 n 1 (1995). Reimbursement is proper where repayment is not a condition of a defendant's representation or sentence. *Id.* at 388.

**Responsibilities of appointed counsel.** An attorney appointed to represent an indigent defendant is responsible for:

- representing the defendant at all trial court proceedings through initial sentencing;*
- filing interlocutory appeals as the attorney deems appropriate;
- responding to any preconviction appeals by the prosecution; and
- except where an appellate lawyer has been appointed, filing post-conviction motions deemed appropriate by the attorney, including motions for a new trial, a directed verdict, plea withdrawal, or resentencing.

MCR 6.005(H)(1)–(4).

*MCR 6.005(H)(1), as amended, effective January 1, 2006.

## 4.11 Multiple Defendants and the Right to Counsel

**Appointed counsel.** "When two or more indigent defendants are jointly charged with an offense or offenses or their cases are otherwise joined, the court must appoint separate lawyers unassociated in the practice of law for each defendant." MCR 6.005(F).

**Retained counsel.** When two or more defendants involved in a case have retained the same counsel or counsel associated in practice, the court must determine whether any potential conflicts of interest might jeopardize the right of each defendant to the uncompromised loyalty of that defendant's attorney. MCR 6.005(F).

A court may not allow the same attorney (or two or more attorneys associated in practice) to jointly represent two or more defendants unless:

> "(1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;
>
> "(2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and

> "(3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding." MCR 6.005(F)(1)–(3).

Although MCR 6.005(F) requires the court to appoint different attorneys to represent multiple indigent defendants charged in the same offense, there is no requirement that multiple defendants be represented by different counsel when the attorneys are retained. This distinction between appointed and retained counsel does not violate a defendant's right to equal protection. *People v Portillo*, 241 Mich App 540, 542 (2000). In *Portillo*, the trial court complied with the requirements of MCR 6.005(F) before permitting the same retained attorney to represent both defendants. *Portillo*, *supra* at 543–544. In addition to the court's inquiry into potential conflicts of interest, the *Portillo* defendant voluntarily agreed to the joint representation. *Portillo*, *supra* at 544.

**Unanticipated conflicts of interest.** "If, in a case of joint representation, a conflict of interest arises at any time, including trial, the lawyer must immediately inform the court. If the court agrees that a conflict has arisen, it must afford one or more of the defendants the opportunity to retain separate lawyers." MCR 6.005(G). On its own initiative the court should inquire into any apparent potential conflicts of interest as they arise and take whatever action the interest of justice requires. *Id*.

## 4.12 Waiver of Rights

### A. Right to Arraignment

Determining whether a defendant waived his or her right to an arraignment requires an examination of all the circumstances. For a defendant's waiver to be valid, the record must establish that the defendant was entitled to an arraignment, that the defendant knew he or she was entitled to an arraignment, and that the defendant voluntarily elected not to exercise that entitlement. *People v Thomason*, 173 Mich App 812, 815–816 (1988).

A defendant does not have the burden of coming forward to request an arraignment even when the defendant is aware that he or she was entitled to an arraignment and the arraignment did not occur. *Thomason*, *supra* at 816.

### B. Right to Counsel

A court cannot accept a defendant's waiver of the right to be represented by an attorney unless the court first

1) advises the defendant of the charge against him or her, the maximum possible prison sentence the defendant could face if convicted of the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

2) offers the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed attorney.

MCR 6.005(D)(1)–(2).

See *People v Hicks*, 259 Mich App 518, 523–531 (2003), for a comprehensive discussion of proper compliance with the requirements of MCR 6.005.

See also *People v Williams*, 470 Mich 634 (2004), and *People v Russell*, 471 Mich 182 (2004).*

*These cases are discussed in Hummel, Criminal Procedure Monograph 3: *Misdemeanor Arraignments & Pleas—Third Edition* (MJI, 2006), Section 3.12.

**Record of continuing waiver.** MCR 6.005(E) requires that a record be made at each proceeding of a defendant's waiver of the assistance of counsel.

> "**(E) Advice at Subsequent Proceedings.** If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings:
>
> > "(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
> >
> > "(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
> >
> > "(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.
>
> "The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel." MCR 6.005(E)(1)–(3).*

*As amended, effective January 1, 2006.

## 4.13 Scheduling the Preliminary Examination

Adult defendants charged with a felony offense or a misdemeanor offense punishable by more than one year of imprisonment are statutorily entitled to a prompt, fair, and impartial examination. MCL 766.1.

The magistrate before whom a felony defendant is arraigned must schedule the defendant's preliminary examination* to commence no more than 14 days after the arraignment. MCL 766.4; MCR 6.104(E)(4). MCR 1.108(1) governs the method of computing the 14-day time period:

> "The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or holiday on which the court is closed pursuant to a court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or holiday on which the court is closed pursuant to court order."

*See Section 5.6 of Criminal Procedure Monograph 5: *Preliminary Examinations—Third Edition* (MJI, 2006), for detailed discussion of an adult defendant's right to a preliminary examination.

A preliminary examination may be adjourned for a reasonable time if the parties consent and good cause is shown for adjournment. If a party objects to the adjournment, the court must make its good-cause finding on the record. MCR 6.110(B).*

*As amended, effective January 1, 2006.

> **Note:** A potential conflict exists between the provisions of MCR 6.104(E)(4), which indicates that the court *must* schedule the defendant's preliminary examination within 14 days of arraignment, and the final sentence of MCR 6.610(H), which discusses an unrepresented defendant's waiver of a preliminary examination. The two court rules appear at once to *mandate*, without apparent qualification, that the district court schedule a defendant's preliminary examination within 14 days of arraignment, and to *permit* the district court, at arraignment, to accept an unrepresented defendant's waiver of his or her preliminary examination, provided the waiver is made freely, understandingly, and voluntarily. Should the potential conflict actually arise in practice, any error or uncertainty may be later addressed by the provisions of MCL 767.42(1), which states in part:
>
> > "If any person waives his statutory right to a preliminary examination without having had the benefit of counsel at the time and place of the waiver, upon proper and timely application by the person or his counsel, before trial or plea of guilty, the court having jurisdiction of the cause, in its discretion, may remand the case to a magistrate for a preliminary examination."

## 4.14 Pretrial Release Determination

Except as otherwise provided by law, an individual charged with a criminal offense is entitled to bail. MCL 765.6(1); Const 1963, art 1, § 15; MCR 6.106(A). A defendant arraigned in district court for a felony or misdemeanor not cognizable by the district court must be informed of his or her right to

*As amended, effective January 1, 2006.

consideration of pretrial release. MCR 6.610(H)(2)(d).* In addition, the court must determine what form of pretrial release is appropriate to the defendant and his or her circumstances. MCR 6.104(E)(5).

> "If it appears that a felony has been committed and that there is probable cause to believe that the accused is guilty thereof, and if the offense is bailable by the magistrate and the accused offers sufficient bail, it shall be taken and the prisoner discharged until trial. If sufficient bail is not offered or the offense is not bailable by the magistrate, the accused shall be committed to jail for trial. This section shall not prevent the magistrate from releasing the accused on his own recognizance where authorized by law." MCL 766.5.

Unless an order has already entered, the court must determine the conditions of a defendant's release at the defendant's first appearance before a court. MCR 6.106(A). If a defendant may not be held in custody pursuant to MCR 6.106(B) (which contains a list of circumstances in which a court may deny a defendant pretrial release and is discussed in Section 4.14(B), below), the court must order the release of the defendant on personal recognizance or an unsecured appearance bond, or subject to a conditional release, with or without money bail (ten percent, cash, or surety). MCR 6.106(A)(2)–(3). See SCAO Forms MC 240 (Order/Pretrial Release) and 241 (Bond).

> **Note:** When a defendant makes a preliminary appearance in a court outside the county of the offense or in a county different from the court designated in the complaint or warrant, MCR 6.104(C) applies to the court's pretrial release determination. Whether to release the defendant pending appearance in the appropriate county requires the court to obtain a recognizance from the accused indicating that he or she will appear within the next 14 days before a court specified in the warrant or, in the case of a warrantless arrest, before a court in the judicial district where the offense occurred, or before some other court designated by that court. MCR 6.104(C). After receiving the accused's recognizance, the court must certify the recognizance and deliver it to the appropriate court "without delay." *Id*. If the accused was not released, he or she must be promptly transported to the judicial district of the offense. *Id.*

## A. Pretrial Release Considerations

In determining which release to use and what terms and conditions to impose on a defendant's release, a court must consider any relevant information, including:

> "(a) defendant's prior criminal record, including juvenile offenses;

*See Section 4.15, below.

"(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;*

"(c) defendant's history of substance abuse or addiction;

"(d) defendant's mental condition, including character and reputation for dangerousness;

"(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;

"(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;

"(g) the availability of responsible members of the community who would vouch for or monitor the defendant;

"(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and

"(i) any other facts bearing on the risk of nonappearance or danger to the public." MCR 6.106(F)(2)(a)–(i).

## B. Denying Pretrial Release

A defendant may be denied pretrial release under very specific circumstances. MCR 6.106(B) provides in part:

"(1) The court may deny pretrial release to

"(a) a defendant charged with

"(i) murder or treason, or

"(ii) committing a violent felony and

"[A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or

"[B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents.

"if the court finds that proof of the defendant's guilt is evident or the presumption great;

> "(b) a defendant charged with criminal sexual conduct in the first degree, armed robbery, or kidnapping with the intent to extort money or other valuable thing thereby, if the court finds that proof of the defendant's guilt is evident or the presumption great, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person.
>
> "(2) A 'violent felony' within the meaning of subrule (B)(1) is a felony, an element of which involves a violent act or threat of a violent act against any other person."

## C. Granting Pretrial Release

If the court is satisfied that a defendant's release on personal recognizance or unsecured appearance bond will reasonably ensure the defendant's appearance as required and will not present a danger to the public, a defendant's release is subject only to the defendant's agreement to appear as required, to remain in the state unless granted permission to leave, and to avoid committing any crimes while released. MCR 6.106(C).

If, however, a court determines that a defendant's pretrial release subject only to the requirements of MCR 6.106(C) is not sufficient to reasonably ensure the defendant's appearance as required or to reasonably ensure the public's safety, the court may order the defendant's pretrial release subject to the requirements contained in MCR 6.106(C) *and* any combination of conditions contained in MCR 6.106(D)(2).* MCR 6.106(D)(1)–(2). These conditions are discussed in Section 4.15, below.

*As amended, effective January 1, 2006.

## D. Record Requirements

**Court rule record requirement.** If a court decides to release the defendant with money bail and one or more of the conditions contained in subrule (D)(2), the court must articulate for the record its reasoning for the decision. MCR 6.106(F)(2). It is not necessary for the court to make a finding on each factor listed in subrule (D)(2). MCR 6.106(F)(2).

**Statutory record requirement.** In contrast to the court rule (which lists nine factors to be considered but contains no mandate to record findings on all nine factors), statutory law expressly mandates that in setting a bail amount, the court consider *and make a finding on the record* with regard to each of the four factors listed in the statute. MCL 765.6(1) states:

> "Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:
>
> "(a) The seriousness of the offense charged.

> "(b) The protection of the public.
>
> "(c) The previous criminal record and the dangerousness of the person accused.
>
> "(d) The probability or improbability of the person accused appearing at the trial of the cause."

**Note:** Even though the court rule does not mandate that the court make and record its findings on each of the factors listed in MCR 6.106(D)(2), following the mandate found in the statute may minimize potential appellate problems.

MCL 765.6(2) details the manner in which a person may post bail:

> "If the court fixes a bail amount under subsection (1) and allows for the posting of a 10% deposit bond, the person accused may post bail by a surety bond in an amount equal to 1/4 of the full bail amount fixed under subsection (1) and executed by a surety approved by the court."

See Section 4.16, below, for the text and a discussion of MCR 6.106(E), the court rule setting forth the details of posting bond.

**Review of the pretrial release decision.** A party may seek review of a court's pretrial release decision by filing a motion (no fee required) in the court having appellate jurisdiction over the court from which the pretrial release decision issued. MCR 6.106(H)(1). Absent its finding an abuse of discretion, the reviewing court may not stay, vacate, modify, or reverse the lower court's pretrial release decision. *Id*.

## 4.15 Conditional Release

*As amended, effective January 1, 2006.

If the court determines that the terms of pretrial release outlined in MCR 6.106(C) are insufficient to guarantee the defendant's appearance as required or do not reasonably ensure the public's safety, the court may order the defendant's release subject to one or more conditions. MCR 6.106(D)(2) sets forth a nonexhaustive list of conditions for a defendant's pretrial release. In addition to the conditions governing a defendant's release on recognizance or unsecured appearance bond (that the defendant will appear as required, will not leave the state, and will not commit any crime), MCR 6.106(D)(2)* authorizes the trial court to make a defendant's release

> "(2) subject to any condition or conditions the court determines are reasonably necessary to ensure the appearance of the defendant as required and the safety of the public, which may include requiring the defendant to

"(a) make reports to a court agency as are specified by the court or the agency;

"(b) not use alcohol or illicitly use any controlled substance;

"(c) participate in a substance abuse testing or monitoring program;

"(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;

"(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;

"(f) surrender driver's license or passport;

"(g) comply with a specified curfew;

"(h) continue to seek employment;

"(i) continue or begin an educational program;

"(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;

"(k) not possess a firearm or other dangerous weapon;

"(l) not enter specified premises or areas and not assault, beat, molest, or wound a named person or persons;

"(m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of each order shall take precedence over the other court order until the conflict is resolved.*

*Effective January 1, 2006.

"(n) satisfy any injunctive order made a condition of release; or

"(o) comply with any other condition, including the requirement of money bail as described in subrule (E), reasonably necessary to ensure the defendant's appearance as required and the safety of the public." MCR 6.106(D)(2)(a)–(o).

## 4.16 Release with Money Bail

The court may decide that the imposition of one or more of the conditions listed above is insufficient to assure the defendant's appearance or to protect the public's safety. In such cases, with or without any of the conditions included in subrule (D), the court may require money bail. If money bail is required, the court must state on the record the reasons it decided bail was necessary to guarantee the defendant's appearance or to preserve the public's safety. MCR 6.106(E).

*As amended, effective January 1, 2006.

When the court requires a defendant to post bond, the defendant has the option of posting a bond to be executed by a court-approved surety or by a surety not approved by the court (including the defendant himself or herself), as long as the bond is secured in a manner approved by the court. MCR 6.106(E)(1)* authorizes the court to require the defendant to:

> "(a) post, at the defendant's option,
>
> > "(i) a surety bond that is executed by a surety approved by the court in an amount equal to 1/4 of the full bail amount, or
> >
> > "(ii) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by
> >
> > > "[A] a cash deposit, or its equivalent, for the full bail amount, or
> > >
> > > "[B] a cash deposit of 10 percent of the full bail amount, or, with the court's consent,
> > >
> > > "[C] designated real property; or
>
> "(b) post, at the defendant's option,
>
> > "(i) a surety bond that is executed by a surety approved by the court in an amount equal to the full bail amount, or
> >
> > "(ii) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by
> >
> > > "[A] a cash deposit, or its equivalent, for the full bail amount, or, with the court's consent,
> > >
> > > "[B] designated real property."

If the court consents to the use of real property to secure a defendant's bond, the court may require the defendant to produce satisfactory proof of the property's value and the defendant's interest in it. MCR 6.106(E)(2).

**Terminating a release order.** When a defendant satisfies the conditions of his or her release and is discharged from all obligations in the case, the court must vacate the defendant's release order and discharge any person who has posted bail or bond. MCR 6.106(I)(1).* If cash or its equivalent was posted for the full amount of the defendant's bail, it must be returned. *Id*. If ten percent of the full bail amount was deposited, the court must return 90 percent of the deposited money and retain ten percent. *Id*.

*As amended, effective January 1, 2006.

Revocation of release and bond forfeiture after a defendant fails to comply with the conditions of his or her pretrial release are issues beyond the scope of this monograph. See MCR 6.106(I)(2) and (3).

## 4.17 Juvenile Arraignments in "Automatic Waiver" Cases

Where a "specified juvenile violation" (discussed below) is alleged, the "automatic waiver" procedure allows a prosecuting attorney to vest jurisdiction in the "Criminal Division" of the circuit court by filing a complaint and warrant in district court rather than filing a petition in the Family Division of Circuit Court. See MCL 600.606(1), MCL 764.1f(1), and MCL 712A.2(a)(1).*

*See Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings—Revised Edition* (MJI, 2003), for more information.

Subchapter 6.900 of the Michigan Court Rules is dedicated to "automatic waiver" cases. MCR 6.901(B) defines the scope of these rules:

> "The rules apply to criminal proceedings in the district court and the circuit court concerning a juvenile against whom the prosecuting attorney has authorized the filing of a criminal complaint charging a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court. The rules do not apply to a person charged solely with an offense in which the family division has waived jurisdiction pursuant to MCL 712A.4 ['traditional waiver' procedure]."

For purposes of the applicable court rules, "juvenile" means an individual at least 14 years of age who allegedly committed a "specified juvenile violation" on or after the individual's 14th birthday and before the individual's 17th birthday. MCR 6.903(E).

In addition to its inclusion in MCR 6.903(H), the list of "specified juvenile violations" is found in MCL 712A.2(a)(1), MCL 600.606(2), and MCL 764.1f(2). In its entirety, the list includes:

- burning a dwelling house, MCL 750.72;
- assault with intent to murder, MCL 750.83;
- assault with intent to maim, MCL 750.86;

- assault with intent to rob while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529;
- carjacking, MCL 750.529a;
- bank, safe, or vault robbery, MCL 750.531;
- assault with intent to do great bodily harm, MCL 750.84, if armed with a dangerous weapon;
- first-degree home invasion, MCL 750.110a(2), if armed with a dangerous weapon;
- escape or attempted escape from a medium- or high-security juvenile facility operated by the Family Independence Agency* or a county juvenile agency, or a high-security facility operated by a private agency under contract with the Family Independence Agency or a county juvenile agency, MCL 750.186a;
- manufacture, sale, or delivery of 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7401(2)(a)(i), or possession of 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7403(2)(a)(i);
- any attempt to commit any of the above crimes, MCL 750.92;
- any solicitation to commit any of the above crimes, MCL 750.157b;
- any conspiracy to commit any of the above crimes, MCL 750.157a;
- lesser included offenses of any of the above crimes, MCR 6.903(H)(18); and
- any other violations arising out of the same transaction if the juvenile is charged with committing one of the above offenses. MCR 6.903(H)(19).

*Now the Department of Human Services (DHS).

MCL 764.27 states that "[e]xcept as provided in [MCL 600.606]," a person under 17 years of age arrested with or without a warrant must be taken immediately before the Family Division of Circuit Court. The "automatic waiver" provision of MCL 600.606 operates as an exception to MCL 764.27's

mandate that a juvenile first be taken before a Family Division court after his or her arrest. *People v Brooks*, 184 Mich App 793, 797–798 (1990). In *Brooks*, the trial court suppressed a juvenile defendant's statement to police because the juvenile was not "taken immediately before the family division of the circuit court" as required by MCL 764.27. In reversing the trial court's decision, the Court of Appeals explained:

> "[T]he Legislature intended that those juveniles charged as adult offenders pursuant to §606 fall outside of the juvenile court's jurisdiction. Because §606 divests the juvenile court of jurisdiction and gives the circuit court original jurisdiction in the matter, the mandatory provisions set forth in [MCL 764.]27 do not apply to those juveniles charged as adult offenders." *Brooks*, *supra* at 798.

## 4.18 Procedure Required for Juvenile Arraignments in District Court

MCR 6.907 specifies the procedure for conducting juvenile arraignments in district court.* Specific time limits apply to juvenile arraignments when the prosecutor has decided to proceed against the juvenile by complaint and warrant for the juvenile's alleged commission of a specified juvenile violation. MCR 6.907(A)(1)–(2) state:

*See Section 4.31 for a checklist of the steps required in juvenile arraignments.

> **"(A) Time.** When the prosecuting attorney authorizes the filing of a complaint and warrant charging a juvenile with a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court, the juvenile in custody must be taken to the magistrate for arraignment on the charge. The prosecuting attorney must make a good-faith effort to notify the parent of the juvenile of the arraignment. The juvenile must be released if arraignment has not commenced:
>
> > "(1) within 24 hours of the arrest of the juvenile; or
> >
> > "(2) within 24 hours after the prosecuting attorney authorized the complaint and warrant during special adjournment pursuant to MCR 3.935(A)(3), provided the juvenile is being detained in a juvenile facility."

*See Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings—Revised Edition* (MJI, 2003), Section 3.6, for more information.

> **Note:** MCR 3.935(A)(3), the special adjournment provision referred to above, requires the Family Division of Circuit Court, upon the prosecuting attorney's request, to adjourn a preliminary hearing in a delinquency proceeding for up to five days to allow the prosecutor to decide whether to proceed under the "automatic waiver" statutes.*

At a juvenile's arraignment on the complaint and warrant charging him or her with a "specified juvenile violation," the court must first determine whether the juvenile is accompanied by a parent, guardian, or adult relative. MCR 6.907(C)(1). The court may conduct a juvenile's arraignment in the absence of the juvenile's parent, guardian, or adult relative, as long as the court has appointed an attorney to appear with the juvenile at arraignment or an attorney retained by the juvenile appears with him or her at arraignment. *Id*.

A juvenile's preliminary examination must be scheduled within 14 days of the juvenile's arraignment. MCR 6.907(C)(2). This 14-day period may be reduced by as many as three days for time given and used by the prosecutor under the special adjournment provision of MCR 3.935(A)(3).

A juvenile may waive his or her right to a preliminary examination if the juvenile is represented by an attorney and makes a written waiver of the right in open court. MCR 6.911(A). The magistrate must determine on the record that the juvenile's waiver was freely, understandingly, and voluntarily given. *Id*.

## 4.19 Juvenile Pretrial Release

*See Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings—Revised Edition* (MJI, 2003), for detailed information.

MCR 6.909 governs the release or detention of juveniles pending trial and other court proceedings.*

**Bail.** Except when bail may be denied, the court must advise a juvenile defendant of the right to bail as that right is provided for adults accused of bailable criminal offenses. MCR 6.909(A)(1). The court may order a juvenile released to a parent or guardian and impose any lawful conditions on the juvenile's release, including the condition that bail be posted. *Id*.

**Detention without bail.** MCR 6.909(A)(2) specifies the circumstances in which a juvenile may be denied bail:

> "(2) If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or the court may deny bail:
>
> > "(a) to a juvenile charged with first-degree murder, second-degree murder, or

> "(b) to a juvenile charged with first-degree criminal sexual conduct, or armed robbery,
>
> > "(i) who is likely to flee, or
> >
> > "(ii) who clearly presents a danger to others." MCR 6.909(A)(2)(a)–(b).

**Juvenile's place of confinement during detention without bail.** A juvenile charged with a crime and not released while awaiting trial or sentencing must be placed in a juvenile facility. MCR 6.909(B)(1). On motion of the prosecuting attorney or the superintendent of the juvenile facility where a juvenile is detained, the court may order that the juvenile be lodged in a facility used to incarcerate adult prisoners if the juvenile's conduct is a menace to other juveniles or if "the juvenile may not otherwise be safely detained in a juvenile facility." MCR 6.909(B)(2)(a)–(b).

A juvenile shall not be placed in an institution operated by the family division of the circuit court unless the family division consents to the placement or the circuit court orders the placement. MCR 6.909(B)(3). A juvenile in custody or otherwise detained must be maintained separately from adult prisoners or defendants pursuant to MCL 764.27a. MCR 6.909(B)(4). See Section 4.31 for a checklist of required steps in juvenile arraignments and pretrial release.

## 4.20 A Crime Victim's Rights Following Arraignment

Article 1 of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., assigns certain rights and responsibilities to victims of felonies.* Although most provisions of the CVRA deal with a law enforcement agency's obligations, the court may find it helpful to be cognizant of the following sections of the CVRA as early as the arraignment.

*See Miller, *Crime Victim Rights Manual—Revised Edition* (MJI, 2005), for a detailed and comprehensive discussion of the Crime Victim's Rights Act.

**Identifying information about a crime victim is protected.** MCL 780.758(2) provides that a victim's home and work addresses and telephone numbers must not be in the court file or "ordinary" court documents unless they are contained in a trial transcript or are used to identify the place of a crime. A victim's addresses or telephone numbers are exempt from disclosure under the freedom of information act. MCL 780.758(3)(a).

**Notice required when the defendant is available for pretrial release.** Within 24 hours of a felony defendant's arraignment, the investigating law enforcement agency must notify the victim "of the availability of pretrial release for the defendant." MCL 780.755(1). The notice must include the sheriff's telephone number and must inform the crime victim that he or she may contact the sheriff to find out whether the defendant was released from police custody. *Id*. If a victim has requested notification of a defendant's arrest or release under MCL 780.753, the investigating law enforcement agency must promptly notify the victim of these events. MCL 780.755(1).

*Effective January 1, 2005.

Circuit and district courts are authorized to institute or adopt a drug treatment court.* MCL 600.1062(1). Family divisions are also authorized to institute or adopt a drug treatment court for juveniles. MCL 600.1062(2). If an offender is admitted to a drug treatment court, adjudication of his or her crime may be deferred. MCL 600.1070(1)(a)–(c). A crime victim and others must be permitted to submit a written statement to the court prior to an offender's admission to drug treatment court. MCL 600.1068(4) provides:

> "In addition to rights accorded a victim under the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, the drug treatment court must permit any victim of the offense or offenses of which the individual is charged, any victim of a prior offense of which that individual was convicted, and members of the community in which either the offenses were committed or in which the defendant resides to submit a written statement to the court regarding the advisability of admitting the individual into the drug treatment court."

# Part B—Commentary on Felony Pleas in District Court

MCR 6.111* is a new court rule that authorizes a district court judge to conduct a defendant's arraignment on charges over which the circuit court has trial jurisdiction, *after* the defendant's preliminary examination is completed or waived, and the defendant is bound over for trial. MCR 6.111 further authorizes a district court judge to take a defendant's plea to offenses not cognizable by the district court (serious misdemeanors and felonies) during the arraignment following the defendant's bindover (by probable cause or waiver).

*Effective January 1, 2006.

MCR 6.610(H)*—the subrule governing criminal procedure in district court for offenses cognizable by the circuit court—is not the equivalent of MCR 6.111. MCR 6.610(H) applies to a defendant's first appearance in court on a charged offense over which the circuit court has trial jurisdiction. The arraignment addressed in MCR 6.610(H) is the defendant's appearance in court *before* his or her preliminary examination. The arraignment authorized in MCR 6.111 occurs *after* a defendant's preliminary examination or waiver of the examination. Operation of MCR 6.111 presumes that the defendant has been bound over for trial either after evidence presented at the preliminary examination established probable cause that he or she committed the offense charged, or after the defendant validly waived his or her right to a preliminary examination.

*Effective January 1, 2006. Formerly MCR 6.610(G). See Section 4.8 for more information.

Unless otherwise noted, the arraignment discussed in this part of the monograph refers to the arraignment that occurs after a defendant's preliminary examination. Prior to MCR 6.111, the arraignment for a defendant bound over on a charge over which the circuit court had jurisdiction was required to occur in the court having jurisdiction over the offense charged. MCR 6.113(A). As amended, MCR 6.113(A)* permits a circuit court arraignment to be conducted "as otherwise permitted by [the court rules]." MCR 6.111 "otherwise permits" a district court judge to conduct a circuit court arraignment under the conditions specified in the rule.

*Effective January 1, 2006.

## 4.21 Post-Bindover Arraignments in District Court

New rule MCR 6.111* authorizes district court judges to conduct "circuit court arraignments" and take a defendant's plea to an offense over which the circuit court has trial jurisdiction if the defendant, the defendant's attorney, and the prosecutor consent to it on the record. MCR 6.111(A). Before conducting arraignments under MCR 6.111, however, "[e]ach court intending to utilize th[e] rule shall submit a local administrative order to the State Court Administrator pursuant to MCR 8.112(B) to implement the rule." MCR 6.111(D). Provided that a district court has complied with the requirements of MCR 6.111(D), a circuit court arraignment in district court is subject to the other provisions of MCR 6.111.

*Effective January 1, 2006.

- All parties (the prosecutor, the defendant, and the defendant's attorney) must consent to the district court judge's conduct of the defendant's arraignment following bindover on an offense over which the circuit court has trial jurisdiction. MCR 6.111(A).
- Provided the parties agree, immediately after a defendant is bound over for trial following the preliminary examination or waiver of the exam, the district court judge may take the defendant's plea of not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. *Id.*
- After the defendant tenders his or her plea, the district court judge must transfer the case to circuit court where a circuit court judge shall conduct further proceedings. *Id.*

## 4.22 Procedure for Taking Pleas in District Court in Cases Over Which the Circuit Court Has Trial Jurisdiction

Provided all parties agree to the arrangement, MCR 6.111 authorizes a district court to act as a circuit court to the extent described in MCR 6.111. MCR 6.111(B) requires that the conduct of arraignments under MCR 6.111 conform to the provisions of MCR 6.113. MCR 6.113 addresses a circuit court's conduct of arraignments after a district court has bound a defendant over for trial in circuit court following the defendant's preliminary examination or waiver of the examination.

- The prosecutor must provide the defendant with a copy of the information* before he or she is asked to plead. MCR 6.113(B).
- Unless the defendant waives it at arraignment, the court must either tell the defendant the substance of the offense charged in the information or require that the information be read to the defendant. *Id.*
- The court—the district court judge under MCR 6.111—is required to advise the defendant of his or her plea options if the defendant has waived legal representation. MCR 6.113(B).

*The content of the information is described in MCR 6.112(D), as amended effective January 1, 2006.

> **Note:** Because the operation of MCR 6.111 requires the consent of the defendant and the defendant's attorney, and because MCR 6.113 applies to district court procedure only when the circuit court arraignment occurs in district court under MCR 6.111, it is unclear how a defendant could be arraigned under MCR 6.111 *and* have waived representation. While the operation of MCR 6.111 requires the consent of a defendant's attorney, the rule does not first expressly require that a defendant be represented by an attorney.

- Pleas taken in district court under MCR 6.111 after arraignment for an offense not cognizable in district court must conform to the applicable provisions of MCR 6.301, 6.302, 6.303, and 6.304. MCR 6.111(C). See also MCR 6.113(B).
- Once a plea is taken under MCR 6.111, it is governed by MCR 6.310. MCR 6.111(C).
- A verbatim record of the arraignment must be made. MCR 6.311(B).

## 4.23 Waiving Formal Arraignment in District Court for a Circuit Court Offense

A defendant who is represented by an attorney has the right to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement waiving arraignment. MCR 6.113(C). The written waiver statement must be signed by the defendant and the defendant's attorney and must acknowledge

- that the defendant received a copy of the information;
- that the defendant read the information or has had it read or explained to him or her;
- that the defendant understands the substance of the charge against him or her;
- that the defendant waives an arraignment in open court; and
- that the defendant stands mute or pleads not guilty to the offense charged in the information.

*Id.*

**Note:** This subrule may lack practical application to arraignments conducted under MCR 6.111. MCR 6.111(A) specifically permits the district court judge to accept a plea to an offense not cognizable by the district court *immediately* following bindover. Bindover after a defendant's preliminary examination or waiver presumes that the defendant *is present* in court. Neither MCR 6.610(H) nor MCR 6.113(C) indicate a method by which a defendant may provide a written waiver of his or her preliminary examination.

## 4.24 Pleas That Require Consent

When a district court judge conducts a circuit court arraignment under MCR 6.111, the rule states that "[p]leas taken pursuant to this rule shall be taken in conformity with MCR 6.301, 6.302, 6.303, and 6.304, as applicable, and, once taken, shall be governed by MCR 6.310." MCR 6.111(C).

- MCR 6.301(B) requires that the district court judge consent to a defendant's nolo contendere plea to a felony offense when the plea is offered in an arraignment conducted pursuant to MCR 6.111.

- The district court judge *and* the prosecutor must consent to the following pleas when the pleas are offered in an arraignment conducted pursuant to MCR 6.111:

  - A defendant wishing to plead guilty but mentally ill or not guilty by reason of insanity may enter such a plea after complying with the examination required by law. MCR 6.301(C)(1).

  - A defendant may tender a conditional plea* of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. MCR 6.301(C)(2).

    > "A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made part of the record. The appeal is by application for leave to appeal only." MCR 6.301(C)(2).

*See Hummel, Criminal Procedure Monograph 3: *Misdemeanor Arraignments & Pleas—Third Edition* (MJI, 2006), Section 3.33, for more information on conditional pleas.

- The district court judge may not accept a plea to an offense other than the one charged unless the prosecutor consents. MCR 6.301(D).

## 4.25 Guilty and Nolo Contendere Pleas

Pleas taken during an arraignment conducted pursuant to MCR 6.111 must "be taken in conformity with MCR 6.301, 6.302, 6.303, and 6.304, as applicable, and, once taken, shall be governed by MCR 6.310." MCR 6.111(C). Therefore, MCR 6.302 applies to guilty and nolo contendere (no contest) pleas* taken by the district court judge in criminal cases over which the circuit court has trial jurisdiction. MCR 6.111(C).

*See Hummel, Criminal Procedure Monograph 3: *Misdemeanor Arraignments & Pleas—Third Edition* (MJI, 2006), Sections 3.24, 3.25, 3.30, and 3.31, for more information.

MCR 6.302(A)* prohibits a court from accepting a defendant's guilty or no contest plea unless the court is convinced that the plea is understanding, voluntary, and accurate. Before accepting a defendant's guilty or no contest plea in an arraignment conducted pursuant to MCR 6.111, the district court judge must place the defendant under oath and "personally carry out subrules (B)–(E)." MCR 6.302(A). Plea proceedings must be recorded verbatim. MCR 6.302(F).

*As amended, effective July 13, 2005.

## A. Plea Must Be Understanding

To determine that a defendant understands the implications of pleading guilty or no contest, the district court judge must speak directly to the defendant or defendants, advise them of the following, and determine that each defendant understands:

> "(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;
>
> "(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law;
>
> "(3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:
>
> > "(a) to be tried by a jury;
> >
> > "(b) to be presumed innocent until proved guilty;
> >
> > "(c) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;
> >
> > "(d) to have the witnesses against the defendant appear at the trial;
> >
> > "(e) to question the witnesses against the defendant;
> >
> > "(f) to have the court order any witnesses the defendant has for the defense to appear at the trial;
> >
> > "(g) to remain silent during the trial;
> >
> > "(h) to not have that silence used against the defendant; and
> >
> > "(i) to testify at the trial if the defendant wants to testify." MCR 6.302(B)(1)–(3).*

*As amended, effective July 13, 2005.

The district court judge may communicate the advice required in MCR 6.302(B)(1)–(3) "by a writing on a form approved by the State Court Administrator. If the court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights." MCR 6.302(B).*

*As amended, effective July 13, 2005.

Still speaking directly to the defendant, the district court judge, before accepting a defendant's guilty or no contest plea, must further advise the defendant that

> "(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea; [and]
>
> "(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right." MCR 6.302(B)(4)–(5).

## B. Plea Must Be Voluntary

Before the district court judge acting under MCR 6.111(A) can accept a defendant's guilty or no contest plea to a criminal offense over which the circuit court has trial jurisdiction, the court must establish that the plea is offered voluntarily. MCR 6.302(C). In making this determination, the court must ask the prosecutor and the defendant's attorney whether there is a plea agreement. MCR 6.302(C)(1).

Where a plea agreement does exist, the court must ask either the prosecutor or the defendant's attorney to state the terms of the agreement. MCR 6.302(C)(2). After the terms of the plea agreement are disclosed, the court must confirm the terms of the agreement with the parties, including the defendant. *Id*.

Where the plea agreement indicates that the defendant's plea is given in exchange for a prosecutorial sentence recommendation or specific sentence disposition, the court may

> "(a) reject the agreement; or
>
> "(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or
>
> "(c) accept the agreement without having considered the presentence report; or
>
> "(d) take the plea under advisement.
>
> "If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the

> defendant will be allowed to withdraw from the plea agreement." MCR 6.302(C)(3).

Regardless of whether a plea agreement exists, the district court judge is required to ask the defendant whether anyone has threatened the defendant in relation to his or her plea and whether it is the defendant's own choice to plead guilty. MCR 6.302(C)(4)(b) and (c). If there is no plea agreement, the court must ask the defendant if he or she has been promised anything in exchange for the plea. MCR 6.302(C)(4)(a). If there is a plea agreement, the court must ask whether anyone has promised the defendant anything in addition to what is reflected in the terms of the plea agreement. *Id*.

> **Note:** MCR 6.111 does not indicate whether a district court judge conducting an arraignment under MCR 6.111(A) is authorized to accept a defendant's plea when the plea is made in the context of a plea agreement or sentence bargain. Since the district court judge's authority to accept a defendant's plea under MCR 6.111 requires the consent of the prosecutor, the defendant, and the defendant's attorney, it is conceivable that those same parties negotiated a plea agreement or sentence bargain prior to entry of a defendant's plea under MCR 6.111. Short of participating in a defendant's sentence, MCR 6.111 does not expressly prohibit a district court judge from exercising the discretion described in MCR 6.302(C)(3)(a)–(d). MCR 6.111(A) and (C). Until any uncertainty is settled, if a district court judge does accept a defendant's plea in the context of a plea agreement or sentence bargain, it would be advisable for the district court judge to explain to the defendant that the circuit court may retain the same authority over the defendant's plea (to accept, reject, etc.) vested in it by MCR 6.302(C) without regard to the district court judge's action.

## C. Plea Must Be Accurate

Before a district court judge may accept a defendant's guilty or no contest plea to an offense over which the circuit court has trial jurisdiction, the court must determine that the plea given is accurate. MCR 6.302(D). When a defendant pleads guilty, the court must question the defendant to establish support for concluding that the defendant is guilty of the charged offense or of the offense to which the defendant is pleading guilty. MCR 6.302(D)(1).

When a defendant pleads nolo contendere, the court must—without questioning the defendant about his or her participation in the charged offense—determine that support exists for concluding that the defendant is guilty of the charged offense or of the offense to which the defendant is pleading no contest. MCR 6.302(D)(2)(b). The court must also indicate why a no contest plea is appropriate in the defendant's case. MCR 6.302(D)(2)(a).

If a defendant's no contest or guilty plea is accepted, MCR 6.302(E) requires the court to further question the prosecutor and defense attorney. Under MCR

6.302(E), the trial court must ask the prosecutor and the defendant's attorney "whether either is aware of any promises, threats, or inducements other than those already disclosed on the record." MCR 6.302(E). The court must also ask the parties whether they are satisfied that the court has complied with the requirements of MCR 6.302(B)–(D); a defendant's plea may not be accepted until any deficiency is corrected. MCR 6.302(E).

## 4.26 Plea of Guilty But Mentally Ill

*As amended, effective January 1, 2006.

MCR 6.303* applies when a defendant tenders a plea of guilty but mentally ill in an arraignment conducted pursuant to MCR 6.111.

*Discussed in detail in Section 4.25, above.

> "Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302.* In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill at the time of the offense to which the plea is entered. The reports must be made a part of the record." MCR 6.303.

## 4.27 Plea of Not Guilty By Reason of Insanity

During the arraignment authorized under MCR 6.111, a district court judge may take a defendant's plea of not guilty by reason of insanity to an offense over which the circuit court has trial jurisdiction. MCR 6.111(A). Whether taken in district court or circuit court, a plea of not guilty by reason of insanity is governed by MCR 6.304. MCR 6.111(C). MCR 6.304 states:

> **"(A) Advice to Defendant.** Before accepting a plea of not guilty by reason of insanity, the court must comply with the requirements of MCR 6.302 except that subrule (C) of this rule, rather than MCR 6.302(D), governs the manner of determining the accuracy of the plea.

*As amended, effective January 1, 2006.

> **"(B) Additional Advice Required.** After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands, that the plea will result in the defendant's commitment for diagnostic examination at the center for forensic psychiatry for up to 60 days, and that after the examination, the probate court may order the defendant to be committed for an indefinite period of time.*

> **"(C) Factual Basis.** Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports

prepared and hold a hearing that establishes support for findings that

> "(1) the defendant committed the acts charged, and
>
> "(2) that, [sic] by a preponderance of the evidence, the defendant was legally insane at the time of the offense.*

*As amended, effective January 1, 2006.

**"(D) Report of Plea.** After accepting the defendant's plea, the court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime." MCR 6.304(A)–(D).

## 4.28 Refusing to Accept a Defendant's Plea

MCR 6.301(A) permits a court to refuse a defendant's plea as long as the refusal is made pursuant to the court rules.* MCR 6.301 applies to circuit court arraignments conducted in district court pursuant to MCR 6.111. MCR 6.111(C). Where a court refuses to accept a defendant's plea, the court must enter a plea of not guilty on the record. MCR 6.301(A). Similar language appears in MCL 774.1a. Where a plea of not guilty is entered, "every material allegation in the information [is placed in issue] and [] the defendant [is permitted] to raise any defense not otherwise waived." MCR 6.301(A).

*See Hummel, Criminal Procedure Monograph 3: *Misdemeanor Arraignments & Pleas—Third Edition* (MJI, 2006), Section 3.35, for more information on refusing a plea.

## 4.29 Withdrawal or Vacation of a Plea

Once a plea is taken by a district court judge pursuant to MCR 6.111, the plea is governed by MCR 6.310.* MCR 6.111(C). The provisions of MCR 6.310 address circumstances under which a defendant is entitled to withdraw his or her plea, as well as situations in which a defendant's plea may be withdrawn or vacated and whether the defendant's consent is required on those occasions. MCR 6.310 provides:

*As amended, effective January 1, 2006.

**"(A) Withdrawal Before Acceptance.** The defendant has a right to withdraw any plea until the court accepts it on the record.

**"(B) Withdrawal After Acceptance but Before Sentence.** After acceptance but before sentence,

> "(1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C).

"(2) the defendant is entitled to withdraw the plea if

(a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or

(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose."

**Note:** MCR 6.111(A) states that following a plea in district court, "the case shall be transferred to the circuit court where the circuit judge shall preside over further proceedings, including sentencing." Unless made immediately after a defendant first tendered his or her plea, a defendant's request to withdraw a plea is likely to arise after the case has been transferred to the circuit court. MCR 6.111(A). Therefore, it is unlikely that a district court judge will be confronted with the issue of plea withdrawal in cases where the arraignment occurred in district court pursuant to MCR 6.111(A).

# Part C—Checklists

[Page intentionally blank.]

[Page intentionally blank.]

## 4.30 Checklist for Felony Arraignments in District Court Pursuant to MCR 6.610(H)

Date: _____ Offense: _____

Case No. _____ Statute: _____

Defendant: _____ Min. Penalty: _____

Defense Atty: _____ Max. Penalty: _____

---

1. ❑ Identify case number and parties for the record.
2. ❑ Read the warrant/complaint into the record.
3. ❑ Advise defendant of the nature of the charged offense, the maximum possible prison sentence for conviction of the offense, and any mandatory minimum sentence required by law.
4. ❑ If defendant is not represented by counsel, advise defendant of the following:
   a. ❑ the right to the assistance of an attorney at arraignment and at all subsequent proceedings.
   b. ❑ the right to remain silent.
   c. ❑ that anything defendant says orally or in writing can be used against him or her in court.
   d. ❑ that defendant is entitled to have an attorney present during any questioning to which he or she consents.
   e. ❑ that if defendant is indigent, the court will appoint an attorney to represent defendant at arraignment and at all subsequent proceedings.
5. ❑ Advise defendant of his or her right to a preliminary examination.
6. ❑ Unless defendant waives a preliminary examination, schedule the exam for a date within 14 days of arraignment and inform defendant of the date.
7. ❑ If defendant waives a preliminary examination, the court must determine that the waiver is given freely, understandingly, and voluntarily before accepting it.
8. ❑ Advise defendant of the right to be released on bond if applicable.
9. ❑ Determine whether pretrial release is appropriate and whether any conditions should be imposed on defendant's pretrial release.
10. ❑ Confirm that defendant has been fingerprinted as required by law.

---

A verbatim record must be made of felony arraignments in district court.

The court may not question defendant about the alleged crime or request that defendant enter a plea to the charged offense.

## 4.31 Checklist for Juvenile Arraignments in District Court

Date: _____ Offense: _____

Case No. _____ Statute: _____

Defendant: _____ Min. Penalty: _____

Defense Atty: _____ Max. Penalty: _____

---

1. ❑ Determine whether a parent, guardian, or adult relative of the juvenile is present. Arraignment may be conducted without the presence of a parent, guardian, or adult relative provided the magistrate appoints an attorney to appear at arraignment with the juvenile or an attorney has been retained and appears with the juvenile.

2. ❑ Read the warrant/complaint into the record. A verbatim record must be made of felony arraignments in district court.

3. ❑ Advise the juvenile of the maximum penalty and any mandatory minimum sentence for each charged offense. Advise the juvenile whether imposition of an adult sentence is required if the juvenile is convicted of the offense.

4. ❑ If the juvenile is without counsel, advise the juvenile that:

    a. ❑ he or she has the right to the assistance of an attorney at arraignment and at all subsequent proceedings.

    b. ❑ he or she has the right to remain silent.

    c. ❑ anything the juvenile says orally or in writing can be used against him or her in court.

    d. ❑ he or she is entitled to have an attorney present during any questioning to which he or she consents.

    e. ❑ if the juvenile is indigent, the court will appoint an attorney to represent him or her at arraignment and at all subsequent proceedings.

5. ❑ A juvenile may waive his or her right to counsel if:

    a. ❑ an attorney is appointed to give the juvenile advice about the waiver of counsel.

    b. ❑ the magistrate or court finds that the juvenile is literate and competent to conduct a defense.

    c. ❑ the magistrate or court advises the juvenile of the dangers and disadvantages of self-representation.

    d. ❑ the magistrate or court finds on the record that the waiver is voluntarily and understandingly made.

    e. ❑ the court appoints standby counsel to assist the juvenile at trial and at his or her sentencing.

6. ❑ Inform the juvenile of his or her right to have a preliminary examination scheduled within 14 days.

7. ❑ A juvenile may waive the right to a preliminary examination if:

    a. ❑ the juvenile is represented by an attorney, and

    b. ❑ the juvenile signs a written waiver in open court, and

    c. ❑ the court determines on the record that the juvenile's waiver is freely, understandingly, and voluntarily given.

8. ❑ Unless waived, the juvenile's preliminary examination must be scheduled within 14 days of the juvenile's arraignment, less the time given and used by the prosecuting attorney pursuant to the special adjournment provision of MCR 3.935(A).

9. ❑ Unless detention without bail is allowed, advise the juvenile of the right to be released on bond. The magistrate or court may order the juvenile released to a parent or guardian, and the court may imposed any lawful condition on the juvenile's release, including the requirement that bail be posted.

10. ❑ If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or the court may deny bail to a juvenile charged with:

    a. ❑ first- or second-degree murder, or

    b. ❑ first-degree criminal sexual conduct or armed robbery if the juvenile is likely to flee or clearly presents a danger to others.

11. ❑ If the juvenile is denied release, determine where the juvenile will be lodged while awaiting his or her preliminary examination and/or trial.

    a. ❑ unless a juvenile's conduct is a menace to other juveniles or the juvenile cannot safely be housed in a juvenile facility, a juvenile charged with a crime and denied bail must be placed in a juvenile facility. If a juvenile is lodged in a facility for adult offenders, the juvenile must be maintained separately from the adults.

    b. ❑ a juvenile may not be placed in an institution operated by the family division of the circuit court unless the family division consents to the placement or the circuit court orders the placement.

12. ❑ Confirm that defendant has been fingerprinted as required by law.